OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

# I. THE ANTIDEFICIENCY ACT

## A. Fiscal Issues

The most frequently discussed statute regarding fiscal law is commonly referred to as the Antideficiency Act. This Act is over 100 years old and its various provisions are found in 31 U.S.C. §§ 1341, 1342, 1349-1351, and 1511-1519. 31 U.S.C. §§ 1341 and 1342 were amended by section 13213 of the Omnibus Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388-621 (1990) November 5, 1990.

The statute prohibits any officer or employee from making or authorizing either an obligation or an expenditure in excess of the amount available in an appropriation or fund. Nor can an employee involve the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations, unless the contract or obligation is authorized by law. 31 U.S.C. § 1341. Any employee who violates the Antideficiency Act is subject to administrative discipline, including suspension without pay or removal from office. 31 U.S.C. §§ 1349, 1518. In addition, knowing and willful violations can subject the employee, upon conviction, to a fine of not more than $5,000 and/or imprisonment of up to two years. 31 U.S.C. §§ 1350, 1519.

While the basic prohibition involves the overobligation or overexpenditure of an entire appropriation, the statute also directs the apportionment and administrative subdivision, or apportionment, of appropriations and requires that regulations be issued governing the further subdivision of apportioned amounts so as to place responsibility for overobligation and/or overexpenditure at the level of the subdivided amount. 31 U.S.C. §§ 1511-1514, 1517. The regulations issued by DoD are found in DoDD 7200.1, 7 May 1984, entitled, "Administrative Control of Appropriations within the Department of Defense," and are implemented in AR 37-1. The theory behind this portion of

the statute is to enable an agency to adequately manage its appropriations so that the various activities having independent responsibility for managing the myriad appropriation subdivisions will be held directly responsible for assuring that no overobligation or overexpenditure of the funds under their control occurs. Without these controls, the chances of an overobligation or overexpenditure at the appropriation level would be significantly increased.

An Antideficiency Act violation must be reported to the President through the Director of the Office of Management and Budget, and to the Congress. The report must include all pertinent facts, as well as a statement of the action taken as a result of the violation. 31 U.S.C. §§ 1351, 1517.

Most violations of the Antideficiency Act relate to overobligations at a subdivision level and do not result in overobligation of an entire appropriation. For example, an activity may enter into a contract in an amount that exceeds its available funds by $100,000. A violation results when the overobligation occurs regardless of whether any expenditures have been made against the contract. Corrective action must be taken. The contract can be cancelled, the obligated amount can be reduced by reducing the contract scope, deobligations from other sources can be made, or additional funds can be obtained through the chain of command. If funds are made available from a higher level within the chain of command, or if other action is taken to deobligate funds and bring the account back into balance, the "overobligation" status will have been eliminated. Nevertheless, the overobligation must still be reported as a violation. Appropriation--ADA Violation--Agency Reports, 35 Comp. Gen. 356 (1955). The effect of "covering" the deficiency by providing otherwise available funds to the local command serves to "contain" the violation at the local level. There would, therefore, be no need to seek additional appropriations to liquidate the overobligation. If funds are not available in the Army to cover a local

Antideficiency Act overobligation, violations will occur throughout the chain of command culminating in a violation at the total appropriation level. In such a case, the overobligation cannot be liquidated (bills cannot be paid) until additional funds are appropriated by the Congress to pay the amounts due.

A violation occasionally occurs when a requiring activity and contracting activity fail to communicate clearly and a contract is executed that obligates the Government in an amount exceeding funds available at the requiring activity. For example, if a requiring activity plans to fund a contract in quarterly increments, an appropriate clause must be included limiting the Government's obligation to the amount actually available. If the contract is executed without the special clause, the Government is bound for the entire contract amount and an obligation in that amount must be recorded. If the funds were not available at the requiring activity at the time the contract was executed, a violation will have occurred regardless of whether funds become available at a later date. As has been stated, correction of a violation by providing additional funds merely mitigates the effect of a violation; it does not alter the fact that a violation has occurred.

Violations of the Antideficiency Act can also occur when there is a specific statutory limitation placed on the use of appropriated funds. The procurement titles, as well as the General Provisions, of the annual DoD appropriations acts contain several such express prohibitions. For example, "None of the funds appropriated or made available in this Act or any prior Acts shall be obligated or expended to implement the United States Army Corps of Engineers Reorganization Study until such reorganization proposed is specifically authorized by law after the date of enactment of this Act." DoD Appropriations Act of 1992 § 8119. Any efforts to obligate or expend Army funds until the proposed reorganization is specifically authorized by law would

result in a violation of the Antideficiency Act because the provision prohibits such use. Army funds, therefore, are not legally available for obligation until the statute is complied with.

As has been noted, obligations in advance of appropriations are also prohibited unless otherwise authorized by law. On occasion, for administrative purposes, it becomes advisable to negotiate a contract for which funds have not yet been appropriated. Federal Acquisition Regulation (FAR) § 32.700 et seq., discusses such contracts and requires use of a clause (FAR § 52.232-18) that conditions the contract upon the availability of funds.

Perhaps the best known statutory authority permitting obligations in advance of appropriations is found in Rev. Stat. 3732, commonly called the "Feed and Forage Act", 41 U.S.C. § 11, discussed below at Section II.

B. Voluntary Services

The Antideficiency Act also contains a provision prohibiting the Government from accepting voluntary service. No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342. Section 13213 of the Omnibus Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388-621, amended 31 U.S.C. § 1342 by providing a definition clarifying what constitutes an emergency involving the safety of human life or the protection of property. The definition specifically excludes ongoing, regular functions of the Government, the suspension of which would not imminently threaten the safety of human life or the protection of property.

Voluntary service has been described as service which, while not performed under contract, carries with it a quasi-

contractual or moral right to compensation. The employment of personal service in excess of that authorized by law has been described as relating to contractual services. 30 Op. Att'y. Gen. 51 (1913). The provision was designed to prevent the departments from incurring obligations over and above those authorized by the Congress. If individuals are to have valid claims against the Government, they cannot do so by making themselves voluntary creditors of the United States. Voluntary Services, 6 Comp. Gen. 273 (1926); Mr. E.J. Dwyer, Authorized Certifying Officer, Housing and Home Finance Agency, B-129004, September 6, 1956. The Court of Claims has held that a Special Assistant United States Attorney, whose job is based on an appointment that fixes his compensation, is not a salaried officeholder of the United States. As such, this specially retained attorney can perform service only after he has been specially appointed. Thus, no compensation can be paid for work performed prior to the appointment because such service must be regarded as voluntary and prohibited by 31 U.S.C. § 1342. Furthermore, the appointment cannot subsequently be made retroactive to cover a period of performance not covered by the original appointment. Lee v. United States, 45 Ct. Cl. 57 (1910). As explained by the court, the appointment cannot vest a right of compensation until it is accepted and "we cannot understand how an appointment can be accepted, either formally or impliedly, before it has been made." Id. at 62.

The Comptroller General has recognized a distinction between "voluntary" service and "gratuitous" service.

> The voluntary service referred to in [31 U.S.C. § 1342] is not necessarily synonymous with gratuitous service, but contemplates service furnished on the initiative of the party rendering the same without request from, or agreement with, the United States therefor. Services furnished pursuant to a formal contract are not voluntary within the meaning of said section.

Personal Services - Stenographic Reporting - Federal Trade Commission, 7 Comp. Gen. 810 (1928).

The prohibition does not apply to the performance of additional service by a clerk in an executive department without additional compensation, but refers to voluntary services rendered by private persons without authority of law. 30 Op. Att'y Gen. 129 (1913). Further, the term "voluntary service" was not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be nonsalaried. 30 Op. Att'y Gen. 51 (1913);see also Experts and Consultants - Employment Without Compensation; Traveling Expenses, 27 Comp. Gen. 194 (1947) (confirming the authority to contract with experts and consultants who agree to serve without compensation). On the other hand, an employee serving in a position whose compensation is fixed by law may not agree to waive all or a part of his salary.Galavy v. Unites States, 182 U.S. 595 (1901);Miller v. United States, 103 F. 413 ( id. court 1900);Compensation - Waivers, 26 Comp. Gen. 956 (1947). The "evil at which Congress was aiming was not appointment or employment for authorized services without compensation, but the acceptance of unauthorized services not intended or agreed to be gratuitous and, therefore, likely to afford a basis for a future claim upon Congress." 30 Op. Att'y Gen. 51, 55 (1913).

The exceptions to the prohibition on accepting voluntary service, i.e., emergencies involving the safety of human life or the protection of property, have been narrowly construed to cover cases of true emergencies threatening human life or destruction of Government property. For example, voluntarily towing a disabled but not endangered aircraft was held to be outside the exception and no recovery was allowed. Voluntary Services - Towing of Disabled Navy Airplane, 10 Comp. Gen. 248 (1930). On the other hand, costs incurred in accompanying a Navy vessel in danger of sinking were held to be within the exception, B-152554, February 24, 1975, as were costs associated with

responding to a request for help in fighting a fire threatening Government property. Voluntary Services in Emergencies, 3 Comp. Gen. 979 (1924).

Categories of exceptions to the prohibition against acceptance of voluntary services are also authorized by statute. For instance, 10 U.S.C. § 1588 permits the Service Secretaries to accept voluntary services to be provided for a museum or a family support program operated by that military department. Such persons are considered Government employees for purposes of workmen's compensation and tort claims statutes.

## II. REVISED STATUTES 3732, 41 U.S.C. § 11

"No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Department of Defense and in the Department of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year."

The first part of this statute closely parallels the Antideficiency Act although the prohibition is limited to "contracts or other purchases." This section is often cited with the Antideficiency Act in discussing the fiscal validity of contracts.

The second portion of the statute is commonly referred to as the "Feed and Forage Act" and provides authority to incur obligations in advance of appropriations for the purposes stated therein. The use of this authority is limited to deficiencies in requirements for the current fiscal year. So long as obligations are incurred for the purposes stated in the statute to meet the needs of the

current year, no violation of the Antideficiency Act will result. It should be noted, however, that the Secretary of Defense, by regulation, severely constrains the use of this authority and will only approve its use in very limited circumstances. DoDD 7220.8, of 16 August 1956. The Feed and Forage Act authorizes incurring obligations; it does not appropriate funds to finance such obligations. As a general proposition, if use of the statute is authorized, a detailed accounting of the obligations incurred is performed and DoD subsequently requests sufficient appropriations to liquidate them.

In addition to the categories of items specified in 41 U.S.C. § 11(a), the Secretary of Defense is authorized to use that contract authority for Airborne Alerts and for the costs of any increase in the number of members of the Armed Forces on active duty. 10 U.S.C. § 2201(b), (c).

## III. 31 U.S.C. § 1301(a)

"Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

Often treated as a companion statute to the Antideficiency Act, the thrust of this statute, dating back to the early 19th century, is to require that appropriated funds be used for the purposes for which they were appropriated. Congress appropriates funds under separate appropriation headings with the language of each heading being determinative of the objects for which such funds may be used. The requirements of 31 U.S.C. § 1301(a) necessitate the management of funds by appropriation to assure compliance. In addition, it is also relied upon to prevent the augmentation of one appropriation with the funds from another unless otherwise authorized. Agriculture

Department-Forest Service, Roads and Trails-Appropriations Availability for Closing, Etc, 53 Comp. Gen. 328 (1973); Public Buildings-Moving Costs and Rent of One Agency for Convenience of Another-Appropriation Availability, 35 Comp. Gen. 701 (1956); Sales of Excess Electricity to Non-Government Activities-Disposition of Proceeds, 28 Comp. Gen. 38 (1948); Appropriations-Contingent Expenses-Availability For Personal Services at Seat of Government; Etc., 26 Comp. Gen. 545 (1947); Departments and Establishments-Services Between-Administrative Expenses, 16 Comp. Gen. 333 (1936).

Title 31 U.S.C. § 1301(a) is most often considered in two situations. First, whether appropriated funds are available at all for the purpose for which used. A two-part test is applied to determine whether a particular expenditure is permissible:

> (1) whether the expenditure is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function; and (2) whether the expenditure is prohibited by law, provided for in a more specific appropriation, or of a type that Congress historically covers with specific legislation.

U.S. Sentencing Commission--Compensation of Staff Director--Authority for Meritorious Awards Program, 66 Comp. Gen. 650 (1987); Internal Revenue Service Federal Credit Union--Provision of Automatic Teller Machine, 66 Comp. Gen. 356, 359 (1987); Prize Drawing at Recruiting Events for Army Doctors, B-234241, May 3, 1989; Implementation of Army Safety Program, B-223608, December 19, 1988. This can range from paying "carrying" charges, Supplemental Contracts for Carrying Charges or Interest on Deferred Payments, 2 Comp. Gen. 181 (1922), to the printing of invitations for change in command ceremonies. Printing and Binding - Christmas Cards, 47 Comp. Gen. 314 (1967); Printing and Binding - Calling Cards, 41 Comp. Gen. 529 (1962); Appropriations--Availability--Invitations- Change of Command Ceremonies-Coast Guard, November 9, 1976.

The second situation relates to mischarging one appropriation when a different appropriation should have borne the expense. For example, APA funds cannot be charged with costs under a contract for a prototype aircraft that are properly chargeable to the RDT&E appropriation. If they are, a violation of 31 U.S.C. § 1301(a) has occurred. In addition, RDT&E funds have been improperly augmented in that APA has, in essence, paid amounts properly chargeable to RDT&E. In such a case, an accounting adjustment must be made to reflect accurately the true nature of the transaction, i.e., RDT&E must be adjusted to accurately reflect that an obligation/expenditure has been made against its account. The adjustment is made as of the time the obligation was erroneously charged against APA, and if insufficient RDT&E funds were available at the time, a violation of the Antideficiency Act would also occur.

While 31 U.S.C. § 1301(a) has, over the years, commonly come to be viewed as applying to the use of funds within an appropriation, such is not the case as a matter of law. The statute addresses the objects of an appropriation, and unless that appropriation is legally subdivided, the statutory prohibition would apply at the appropriation level. Newport News Shipbuilding and Dry Dock Company, 55 Comp. Gen. 812 (1976). Thus, if FY 1992 RDT&E funds are used for FY 1992 RDT&E purposes, no 31 U.S.C. § 1301(a) violation would occur, notwithstanding that funds may have been used for programs other than those budgeted and provided for in congressional reports. Nevertheless, care must be exercised in this area for several reasons. First, while 31 U.S.C. § 1301(a) might not prohibit the use of funds for a particular purpose, rules and regulations require that funds be used in accordance with the purposes for which they are allocated or otherwise subdivided. In addition, the reprogramming rules must be considered.

In the case of RDT&E, DoD constrains the in-house reprogramming of funds between existing program elements to $4 million. Any reprogramming of funds between such program

elements in a cumulative amount in excess of $4 million ($2 million for the addition of a new program element) requires the prior approval of the Congress. In addition to the reprogramming constraint, the administrative subdivision of funds in RDT&E carries this $4 million constraint as a fiscal limitation. Thus, violations thereof also constitute violations of the Antideficiency Act. Accordingly, situations could arise where no violation of 31 U.S.C. § 1301(a) would occur when R&D funds were used for R&D purposes; however, an Antideficiency Act (R.S. 3679) violation could result if the $4 million ceiling on reprogramming between program elements was exceeded as a result of the financial subdivision of RDT&E.

## IV. 31 U.S.C. § 1301(d)

"A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made."

This statute was intended to provide guidance regarding the construction of statutes purporting to appropriate funds or to authorize the execution of contracts involving the expenditure of funds in excess of the amount appropriated. Legislation authorizing the appropriation of funds does not constitute an appropriation of such funds, nor will such authorizing legislation automatically be construed to expand the availability of appropriations made thereafter in the absence of specific provisions to that effect in such appropriations acts. Source of Funds for Payment of Awards Under 26 U.S.C. § 7430, 63 Comp. Gen. 470 (1984); Military Personnel-Economy Act Loss Claims-Appropriation Availability, 37 Comp. Gen. 732 (1958); Appropriations-Authorizations-Federal Employees Uniform Act of 1955, 35 Comp. Gen. 306 (1955); Remission to Guam and Virgin Islands of Estimates of Moneys To Be Collected for Taxes, Duties and

Fees, B-114808, August 7, 1979. For example, the former 10 U.S.C. § 7208 (currently 10 U.S.C. § 1050) authorized the payment for "... the travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses that the Secretary considers necessary for Latin American cooperation." Since the original statutory language did not make an appropriation, a general provision of the DoD Appropriations Act was enacted specifically providing that current year DoD appropriations are available to make the payments authorized in the former 10 U.S.C. § 7208. Once enacted, such a provision established the legal basis for subsequent budgeting for this purpose, although the general provision continued to be reenacted until its repeal by Pub. L. No. 98-525, October 19, 1984. See § 1401(d) of the DoD Appropriations Act, 1985.